

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FEDERATION FOR AMERICAN )  
IMMIGRATION REFORM, )  
25 Massachusetts Ave., N.W. )  
Suite 330 )  
Washington, DC 20001, )  
                              )  
                               )  
Plaintiff,                 )  
                               )  
v.                             ) Civil Action No. \_\_\_\_\_  
                               )  
                               )  
UNITED STATES DEPARTMENT )  
OF STATE,                  )  
2201 C Street, N.W.        )  
Washington, DC 20520,      )  
                               )  
Defendant.                 )  
                               )

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**COMPLAINT**

**NATURE OF ACTION**

1. Plaintiff Federation for American Immigration Reform (“FAIR”) brings this action against Defendant United States Department of State (“State Department”) to compel its compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. On December 11, 2018, pursuant to FOIA, FAIR requested cooperative agreements awarded during fiscal years 2016 to 2018 to nine specific entities that resettle refugees and also requested certain forms that those entities submitted to the State Department during the same fiscal years. The State Department violated FOIA by failing to respond to FAIR’s request within the required time period, by failing to follow the procedures required by FOIA, and by failing to disclose and release the requested records. As part of the relief prayed for in this action, FAIR requests that

this Court order the State Department to respond to FAIR's FOIA request and to release all the responsive records that the State Department improperly withheld.

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

3. This Court has jurisdiction to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

4. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

### **PARTIES**

5. Plaintiff FAIR is a non-profit entity organized under the laws of the District of Columbia and has its principal place of business at 25 Massachusetts Ave, N.W., Suite 330, Washington, DC 20001. FAIR is a tax exempt organization under 501(c)(3) of the Internal Revenue Code. FAIR seeks to educate the citizenry on and increase public awareness of immigration issues, and hold the nation's leaders accountable for enforcing the nation's immigration laws. In furtherance of its public interest mission, FAIR regularly requests access to the public records of federal agencies and disseminates its findings to the public.

6. Defendant State Department is a department of the United States Government and is headquartered at 2201 C Street, N.W., Washington, DC 20520. The State Department is an “agency” within the meaning of 5 U.S.C. § 552(f)(1), and is subject to the provisions of FOIA.

The State Department has possession, custody, and control of the records to which FAIR seeks access.

### **STATEMENT OF FACTS**

7. On December 11, 2018, FAIR submitted a FOIA request by facsimile to the State Department requesting that it release and produce cooperative agreements awarded during fiscal years 2016 to 2018 to nine specific entities that resettle refugees and also requesting certain forms that those entities submitted to the State Department during those fiscal years. Specifically, FAIR requested the State Department to release and produce

- 1) All cooperative agreements awarded during fiscal years 2016 through 2018 to the following nine voluntary agencies or resettlement agencies listed below:
  - Church World Service;
  - Episcopal Migration Ministries;
  - Ethiopian Community Development Council;
  - Hebrew Immigrant Aid Society;
  - International Rescue Committee;
  - Lutheran Immigration and Refugee Service;
  - U.S. Committee for Refugees and Immigrants;
  - United States Conference of Catholic Bishops; and the
  - World Relief.
- 2) All Certification Regarding Lobbying forms and Standard Form- LLL “Disclosure of Lobbying Activities” submitted by these nine organizations during fiscal years 2016 through 2018.

FAIR’s December 11, 2018, FOIA request to the State Department hereinafter is referred to as the “December 11, 2018, FOIA Request.”

8. As of the date of this Complaint, the State Department has not acknowledged the December 11, 2018, FOIA Request; responded to the request as required by FOIA; made and communicated a determination about the request as required by FOIA; or released the requested records.

9. Because of the State Department's inaction in failing to acknowledge the December 11, 2018, FOIA Request, FAIR sent a FOIA request to the State Department on December 18, 2018, by certified mail, return receipt requested, postage prepaid, that was identical to the December 11, 2018, FOIA Request except for the date of the letter and the manner of sending indicated. FAIR's December 18, 2018, FOIA request to the State Department hereinafter is referred to as the "December 18, 2018, FOIA Request." Upon information and belief, according to the certified mail return receipt, the State Department received the December 18, 2018, FOIA Request on December 27, 2018. The State Department has never communicated with FAIR or its representatives about the December 18, 2018, FOIA Request.

10. FOIA provides that agencies "may" promulgate regulations "providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters." 5 U.S.C. § 552(a)(6)(B)(iv).

11. The State Department never notified FAIR whether the State Department was aggregating, or permitted to aggregate, the December 11, 2018, FOIA Request and the December 18, 2018, FOIA Request and treating them, or permitted to treat them, as one FOIA request.

12. In the December 11, 2018, FOIA Request and in the December 18, 2018, FOIA Request (collectively referred to herein as the "December 2018 FOIA Requests"), FAIR

requested that the State Department waive the search, review, and production fees for the December 2018 FOIA Requests. In those requests, FAIR cited its public interest purpose in making them (*see* 5 U.S.C. § 552(a)(4)(A)(iii)) and also explained that FAIR qualifies as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A)(ii)(II). FAIR also requested expedited processing of the December 2018 FOIA Requests.

13. *Inter alia*, the disclosure of records and information that FAIR seeks through the December 2018 FOIA Requests is in the public interest; will contribute significantly to the public’s understanding of the State Department’s agreements with the refugee resettlement entities and their certification of information to the State Department; and is not primarily in FAIR’s commercial interest. Indeed, FAIR, which is a non-profit organization, does not seek the requested records for any commercial benefit.

14. Other government agencies have acknowledged that FAIR is a “representative of the news media” for purposes of FOIA. Among other things, FAIR regularly publishes online periodicals (such as newsletters) and disseminates information through electronic communications.

15. By letter dated January 28, 2019, the State Department acknowledged the December 11, 2018, FOIA Request, stating that (a) the Office of Information Programs and Services (“IPS”) at the State Department received that request on December 12, 2018, and assigned tracking number F-2019-02061 to the request; (b) FAIR’s request for a fee waiver was granted; and (c) FAIR’s request for expedited processing was denied because FAIR did not demonstrate a compelling need for the requested records under the State Department’s FOIA regulations.

16. The letter dated January 28, 2019, from the State Department also stated, in part, that:

The records you seek require the need to search in offices that are separate from the office processing your request. Accordingly, your request falls within “unusual circumstances” as defined in the FOIA. See 5 U.S.C. § 552(a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute.

The letter did not provide date of expected determination for the December 11, 2018, FOIA Request.

17. In its January 28, 2019, letter, the State Department also stated that FAIR could narrow the scope of the request or agree to alternate time frame for processing if the State Department located responsive records. The records that FAIR requested, however, were specific and limited in scope and should have been released without the need for any extension of time. Accordingly, FAIR did not narrow the December 11, 2018, Request or propose a different date for a response or release.

18. FOIA establishes deadlines by which federal agencies must respond to FOIA requests and release responsive documents. 5 U.S.C. § 552(a)(6)(A). A federal agency that is subject to FOIA and that receives a FOIA request must issue a determination within twenty (20) business days after receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). If the agency provides written notice to the requester explaining that “unusual circumstances” exist warranting additional time, the agency may be entitled to one ten (10) day extension to respond to the FOIA request. 5 U.S.C. § 552(a)(6)(B). FOIA also contains certain provisions that apply if an agency properly and timely sent a notice stating that unusual circumstances exist and a FOIA request cannot be processed within the ten additional days. Within the deadlines established by FOIA,

an agency must notify the requester of whether the agency has determined to comply with a request, and of the requestor's right to appeal an adverse determination. *See* 5 U.S.C. § 552(a)(6)(A).

19. With regard to the January 28, 2019, letter from the State Department, 5 U.S.C. § 552(a)(6)(B)(i)-(ii) of the FOIA provides that:

- (i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.
- (ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.

20. FOIA, in 5 U.S.C. § 552(a)(6)(B)(iii), also provides that:

As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests - (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among

two or more components of the agency having substantial subject-matter interest therein.

21. The only grounds that the State Department invoked in its January 28, 2019, letter, was that “[t]he records you seek require the need to search in offices that are separate from the office processing your request. Accordingly, your request falls within ‘unusual circumstances’ as defined in the FOIA. See 5 U.S.C. § 552(a)(6)(B)(i)-(iii).” Upon information and belief, however, the State Department does not need to search offices other than IPS for the requested records, and thus may not properly claim that “unusual circumstances” exist on this basis. Therefore, the State Department was not entitled to an extension to respond to either of the December 2018 FOIA Requests.

22. As an “agency” within the meaning of 5 U.S.C. § 552(f)(1), the State Department must comply with the nondiscretionary statutory requirements of FOIA. The State Department also must comply with the requirements in its FOIA regulations.

23. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), the State Department was required to determine whether to comply with the December 2018 FOIA Requests within twenty (20) working days after receipt of that request and to notify FAIR of its determination, the reasons therefore, and the right to appeal any adverse determination. To invoke the provisions of 5 U.S.C. § 552(a)(6)(B)(i)-(iii) that provide for an extension of time, the State Department had to do so within twenty working days after receiving a FOIA request. In that regard, the State Department regulations provide that:

(g) Time limits. The statutory time limit for responding to a FOIA request or to an appeal from a denial of a FOIA request is 20 working days. Whenever the statutory time limit for processing a request cannot be met because of “unusual circumstances” as defined in the FOIA, and the Department extends the time limit on that basis, **the Department shall, before expiration of the 20-day period to respond**, notify the requester in writing of the unusual

circumstances involved and of the date by which processing of the request can be expected to be completed.

22 C.F.R. §171.11(g) (2018) (emphasis added).

24. In its January 28, 2019, letter, the State Department stated that IPS received the December 11, 2018, FOIA Request on December 12, 2018. Using December 12, 2018, as the day of receipt means that the State Department had to respond to the December 11, 2018, FOIA Request, or invoke the provisions of FOIA providing for an extension, by no later than January 11, 2019. The State Department, however, did not send a letter invoking an extension of time until January 28, 2019.

25. Upon information and belief, at the end of the day on December 21, 2018, the appropriations act that had been funding the State Department expired and appropriations to the Department lapsed. Funding was restored to the State Department in January 2019. Excluding Saturdays, Sundays, and legal holidays, the period when appropriations lapsed still constitutes “working days” or days to be counted under FOIA for purposes of establishing the applicable period within which the State Department had to respond or invoke an extension of time.

26. In discussing the 2013 government shutdown, the U.S. Department of Justice (“Justice Department”) stated that:

agencies have asked **whether the recent government shutdown affected how agencies should count the number of days used to respond to FOIA requests and administrative appeals.** When considering how to calculate the number of days used to respond to FOIA requests and administrative appeals for agency Annual FOIA Reports, the following guidance should apply:

*Agencies and requesters alike generally refer to the FOIA’s time limits as “working days.” Logically, then, they could easily conclude that during a time when FOIA Offices had no choice but to be closed because of the lapse in funding, those days when employees were furloughed were not “working”*

*days and so should not be counted as part of the FOIA's response times. As a matter of policy, however, and consistent with the spirit of openness in administering the FOIA, agencies should count as part of their response times for FOIA requests and appeals the eleven days when the government was closed, which excludes the Saturdays, Sundays, and the one legal public holiday that occurred during the shutdown.*

Our hope and expectation is that requesters will fully understand that even though agencies will be including these shutdown days in their calculations of response times, that because FOIA personnel were not able to work during that period, there will necessarily be an impact on processing times.

<https://www.justice.gov/oip/blog/calculating-foia-response-times-after-government-shutdown> (bold and italics in original). The Justice Department's reasoning and guidance with respect to the government shutdown in 2013 applies, or should apply, with equal force to the government shutdown and lapse of appropriations in December 2018 to January 2019.

27. Applying the above principles and guidance from the Justice Department regarding the computation of time during the 2013 shutdown, the statutory deadline for the State Department to respond to the December 11, 2018, FOIA Request, therefore, was January 11, 2019. The State Department did not respond to the December 11, 2018, FOIA Request by January 11, 2019, or provide a determination regarding the December 11, 2018, FOIA Request by January 11, 2019. Thus, the State Department failed to comply with the time limits in FOIA and the State Department's regulations and violated FAIR's rights.

28. To the extent that the December 18, 2018, FOIA Request constitutes, or is deemed to constitute, a separate FOIA request, and applying the same principles and guidance from the Justice Department regarding the computation of time, the statutory deadline for the State Department to respond to the December 18, 2018, FOIA Request was January 17, 2018.

The State Department did not respond to the December 18, 2018, FOIA Request by January 17, 2019, or provide a determination regarding the December 11, 2018, FOIA Request by January 17, 2019. Thus, the State Department failed to comply with the time limits in FOIA and the State Department's regulations and violated FAIR's rights.

29. As of the date of this Complaint, with respect to the December 11, 2018, FOIA Request, the State Department still has not complied with FOIA (including as required by 5 U.S.C. § 552(a)(6)(A)(i)), and has violated FAIR's rights under the statute. Among other things, the State Department has: (i) failed to determine within 20 business days after receipt of the December 11, 2018, FOIA Request whether to comply with that request; (ii) failed to notify FAIR of any such determination and the reasons for such determination within the required time period; (iii) failed to advise FAIR of its right to appeal any adverse determination of the December 11, 2018, FOIA Request; (iv) failed to produce the requested records or otherwise demonstrate that the requested records are exempt from production; (v) failed timely to invoke the extension provisions in FOIA providing for a response or determination in the case of "unusual circumstances"; (vi) failed to provide an expected date of determination; and (vii) failed to respond to the December 11, 2018, FOIA Request as required by FOIA.

30. To the extent that the December 18, 2018, FOIA Request constitutes, or is deemed to constitute, a separate FOIA request, as of the date of this Complaint with respect to the December 18, 2018, FOIA Request, the State Department still has not complied with FOIA (including as required by 5 U.S.C. § 552(a)(6)(A)(i)), and has violated FAIR's rights under the statute. Among other things, the State Department has: (i) failed to determine within 20 business days after receipt of the December 18, 2018, FOIA Request whether to comply with that request; (ii) failed to notify FAIR of any such determination and the reasons for such determination

within the required time period; (iii) failed to advise FAIR of its right to appeal any adverse determination of the December 18, 2018, FOIA Request; (iv) failed to produce the requested records or otherwise demonstrate that the requested records are exempt from production; (v) failed timely to invoke the extension provisions in FOIA providing for a response or determination in the case of “unusual circumstances”; (vi) failed to provide an expected date of determination; and (vii) failed to respond to the December 18, 2018, FOIA Request as required by FOIA.

31. The applicable time period under FOIA for an agency to provide a response and determination is twenty working days as provided in 5 U.S.C. § 552(a)(6)(A)(i) or the applicable period, if timely invoked, in 5 U.S.C. § 552(a)(6)(B)(i)-(iii). FOIA provides, in part, that:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552(a)(6)(C)(i).

32. With respect to the December 11, 2018, FOIA Request, the State Department (a) failed to comply with the time period in 5 U.S.C. § 552(a)(6)(A)(i) and the provisions of 5 U.S.C. § 552(a)(6)(A)(i)(I)-(III); and (b) failed to comply with the time period in 5 U.S.C. § 552(a)(6)(B)(i)-(iii) and in 22 C.F.R. § 171.11(g) applicable to “unusual circumstances” – to the extent that such provisions are deemed to apply and were timely invoked – including by failing to provide an expected date of determination or the date by which the State Department expected to complete processing that request. Thus, the State Department failed to comply with its regulations as well as FOIA and violated FAIR’s rights.

33. With respect to the December 18, 2018, FOIA Request, the State Department (a) failed to comply with the time period in 5 U.S.C. § 552(a)(6)(A)(i) and the provisions of 5 U.S.C. § 552(a)(6)(A)(i)(I)-(III); and (b) failed to comply with the time period in 5 U.S.C. § 552(a)(6)(B)(i)-(iii) and in 22 C.F.R. § 171.11(g) applicable to “unusual circumstances” – to the extent that such provisions are deemed to apply and were timely invoked – including by failing to provide an expected date of determination or the date by which the State Department expected to complete processing that request. Thus, the State Department failed to comply with its regulations as well as FOIA and violated FAIR’s rights.

34. Because the State Department has failed to comply with the time limit to respond to the December 2018 FOIA Requests, the State Department has constructively denied them. FAIR, therefore, is deemed to have exhausted any and all administrative remedies with respect to each of those two FOIA requests. *See* 5 U.S.C. § 552(a)(6)(C)(i).

35. Because FAIR has exhausted its administrative remedies regarding the December FOIA Requests, FAIR is entitled to petition this Court for injunctive and declaratory relief from the State Department’s withholding of the requested records. *See* 5 U.S.C. § 552(a)(4)(B).

36. FAIR has a legal right to the requested records. The State Department improperly has withheld those records, requiring and/or forcing FAIR to file suit to enforce its rights under FOIA.

### **COUNT I**

(Violation of FOIA, 5 U.S.C. § 552)

37. FAIR re-alleges paragraphs 1 through 36 as if fully stated herein.

38. The State Department failed to respond to the December 2018 FOIA Requests within the statutory deadlines imposed by FOIA. As a result, the State Department violated FAIR's rights under FOIA, including but not limited to those set forth in 5 U.S.C. § 552(a)(6).

39. The State Department failed to determine whether to comply with the December 2018 FOIA Requests within twenty (20) working days after receipt of those requests and to notify FAIR of its determination, the reasons therefore, and the right to appeal any adverse determination.

40. The State Department failed to timely invoke the provisions of FOIA providing for an extension of time based on "unusual circumstances" in response to the December 11, 2018, FOIA Request. With respect to the December 11, 2018, FOIA Request, the State Department failed to provide an expected date of determination, or the date by which the State Department expected to complete processing that request, as required by 5 U.S.C. § 552(a)(6)(B)(i) and the State Department's regulations. As a result, the State Department violated FAIR's rights under its regulations and under FOIA, including based on (but not limited to) the provisions of 5 U.S.C. § 552(a)(6).

41. The State Department failed to invoke (or alternatively, to timely invoke) the provisions of FOIA providing for an extension of time based on "unusual circumstances" in response to the December 18, 2018, FOIA Request. With respect to December 18, 2018, FOIA Request, the State Department failed to provide an expected date of determination, or the date by which the State Department expected to complete processing that request, as required by 5 U.S.C. § 552(a)(6)(B)(i) and the State Department's regulations. As a result, the State Department violated FAIR's rights under its regulations and under FOIA, including based on (but not limited to) the provisions of 5 U.S.C. § 552(a)(6).

42. As of the date of this Complaint, the State Department has failed to state which records, if any, it intends to release and produce (whether in whole or in part) in response to the December 2018 FOIA Requests.

43. As of the date of this Complaint, the State Department has failed to release or produce any records in response to the December 2018 FOIA Requests, in violation of FAIR's rights under FOIA, including based on (but not limited to) the provisions of 5 U.S.C. § 552(a)(3)(A).

44. The State Department wrongfully is withholding responsive records from FAIR that FAIR requested pursuant to 5 U.S.C. § 552. The State Department failed to disclose and produce records responsive to the December 2018 FOIA Requests without a legal basis for withholding such records, in violation of FOIA, including but not limited to 5 U.S.C. §§ 552(a)(3)(A) and (6)(A). The failure and/or refusal of the State Department to disclose and produce records responsive to the December 2018 FOIA Requests is improper and unlawful.

45. FAIR is entitled to injunctive relief compelling the release and disclosure of the requested records. FAIR is being harmed by reason of the State Department's unlawful withholding of the requested records. FAIR will continue to be harmed unless this Court compels the State Department to comply with FOIA and applicable law.

46. FAIR is entitled to declaratory relief that the State Department has violated FAIR's rights under FOIA and that FAIR is entitled to receive all non-exempt records requested in the December 2018 FOIA Requests.

47. FAIR is entitled to its reasonable attorneys' fees and other litigation costs under 5 U.S.C. § 552(a)(4)(E).

## **PRAYER FOR RELIEF**

WHEREFORE, FAIR respectfully requests that the Court:

- (a) Expedite consideration of this action, pursuant to 28 U.S.C. § 1657;
- (b) Find and declare that the State Department violated FOIA by failing to respond timely to the December 2018 FOIA Requests, by failing to follow the procedures required by FOIA, and by failing to disclose and release records in response to the December 2018 FOIA Requests;
- (c) Order the State Department to conduct an adequate search for any and all records responsive to the December 2018 FOIA Requests, and require the State Department to show that it employed search methods reasonably likely to lead to the discovery of the records responsive to the December 2018 FOIA Requests;
- (d) Order the State Department to produce and release all non-exempt records responsive to the December 2018 FOIA Requests within twenty (20) business days of the Court's Order in this action and to provide FAIR with a *Vaughn* index of any responsive records, material, or information withheld under claim of exemption;
- (e) Enjoin the State Department from continuing to withhold any and all non-exempt records responsive to the December 2018 FOIA Requests;
- (f) Enjoin the State Department from charging fees or costs for the processing of the December 2018 FOIA Requests (including any fees or costs for the search, review, and production of records);
- (g) Award FAIR its reasonable attorneys' fees and other litigation costs in this action, pursuant to 5 U.S.C. §552(a)(4)(E); and
- (h) Grant FAIR such other relief as the Court may deem just and proper.

Dated: June 14, 2019

Respectfully submitted,

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